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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 690

CHRIS D. STOLTZFUS AND IRMA H. STOLTZFUS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–26) is reported at 398 F. 2d 1002. The opinion of the district court (Pet. 11–17) is reported at 264 F. Supp. 824. The district court's memorandum and order denying new trial (Pet. 18–20) has not been reported.

JURISDICTION

The opinion of the court of appeals was filed on July 31, 1968. (Pet. 21.) Petition for rehearing was

denied on September 26, 1968. The petition for certiorari was filed on October 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly found that petitioners' tax deficiencies were due to fraud within the meaning of Section 6653(b) of the Internal Revenue Code of 1954, concerning civil fraud penalties.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 6651. FAILURE TO FILE TAX RETURN.
>
> (a) *Addition to the Tax.*—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 per-

cent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * * *

SEC. 6653. FAILURE TO PAY TAX.

* * * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

STATEMENT

Petitioners sued in the district court to recover a 50 percent civil fraud penalty assessed under Section 6653(b) of the Internal Revenue Code of 1954 upon 1954 income tax admittedly owed but not paid until the taxpayer [1] belatedly filed a 1954 return on or about October 30, 1959. (R. 9a–11a, 104a; Supp. R. 1b–8b.) [2] The district court concluded that the tax deficiency was "due to fraud" within the meaning of

[1] The term "taxpayer" will be used to refer to petitioner Chris D. Stoltzfus. His wife, also a petitioner, is involved only because of the filing of a joint income tax return.

[2] "R." refers to the appendix to petitioners' brief in the court of appeals. "Supp. R." refers to the appendix to the government's brief in that court.

Section 6653(b) and sustained the penalty.[3] (Pet. 11–17.)

The taxpayer testified that as a result of a business calamity he had been unable to pay $26.43 which he owed as the second installment of his estimated 1943 income tax, that he then regarded himself as a tax dodger and, fearing what would happen if the fact became known, filed no returns and paid no tax for about 16 years thereafter. He did not seek legal advice during all that period. (R. 50a–56a, 60a–64a, 89a; Supp. R. 77b.)

In June and July, 1959, a revenue officer served a levy on the taxpayer, as his brother's employer, to collect the brother's tax. At some time during the summer of 1959, the taxpayer finally consulted an attorney concerning his own income taxes.[4] (Supp. R. 13b–16b, 68b–70b.) He subsequently retained an accountant, who prepared returns for the back years which were filed in October 1959 and January 1960. The accountant prepared the returns for the years 1943 through 1953 by the net worth method, relying on the

---

[3] The judge who heard the evidence died before rendering a decision, and by stipulation of the parties another judge decided the case on the written record (R. 103a). The second judge stated that he had "construed all of the evidence most favorably to the plaintiff" because, although he had presided at the taxpayer's prior criminal trial, he did not have in this case a "fresh opportunity to assess" the credibility of the witness. (Pet. 12.)

[4] In his brief below, at p. 6 n. 4, the taxpayer was "willing to assume [for purposes of that appeal] that the government's investigation provided the final stimulus * * * to overcome his previous inability to consult an attorney."

taxpayer's memory for various costs. The later returns were based on books which the accountant constructed from bank statements, cancelled checks, and a sales book, with accurate results in his opinion.[5] (Supp. R. 42b–51b.)

The taxpayer testified that he had kept good records so that he would have them "when the time came that I could go in on voluntary disclosure", but that in 1956 he learned "that voluntary disclosure was no longer recognized." (R. 61a–63a.) In 1960 he told an investigating agent that only his wife maintained his business records because he did not want anyone else to know that he had not filed returns. (Supp. R. 54b, 56b.) A pilot he employed at an earlier time testified that the taxpayer refused to give him a "W–2" form showing his earnings record. (Supp. R. 20b–34b.)

The district court concluded that taxpayer's "belief that by becoming as inconspicuous as possible he could escape governmental detection cannot be interposed as a defense", and that " 'the circumstances surrounding the failure to file returns * * * strongly and unequivocally indicate an intention to avoid the

[5] The returns finally filed in 1959 and 1960 reported no tax or small amounts of tax for the years through 1950, and amounts of tax for later years as follows (Supp. R. 12b; Exs. G–3 through G–18):

1951	$752.28
1952	1,781.70
1953	1,354.36
1954	596.50
1955	16,697.73
1956	50,838.59

payment of taxes.' *Cirillo* v. *C.I.R.*, supra, 314 F. 2d at p. 482." (Pet. 15–16, 17.) The court subsequently denied the taxpayer's motion for a new trial.

ARGUMENT

Petitioners erroneously suggest that there is a significant conflict among the circuits as to whether the "affirmative action" required to establish guilt of the crime of tax evasion (*Spies* v. *United States*, 317 U.S. 492, 498) is also necessary to establish "fraud" for purposes of the 50 percent civil penalty provided in Section 6653(b) of the Internal Revenue Code of 1954 for "underpayment * * * of tax * * * due to fraud."

The problem in *Spies* v. *United States, supra,* was to distinguish the *felony* of willful attempt to evade tax, proscribed by Section 145(b) of the 1939 Code, from the *misdemeanor* of willful failure to file a return or to pay a tax, proscribed by Section 145(a).[6] This Court found the necessary distinction in the word "attempt," used only in the felony statute. It held that a simple omission to file returns was not by itself an attempt to evade tax, but that some additional "affirmative action" to conceal the amount or existence of liability must be shown, such as falsification of books or maintenance of secret accounts. The record does not show the taxpayer to have engaged in such activities.

The suggested requirement of "affirmative action"

[6] These provisions now appear as Sections 7201 and 7203, respectively, of the 1954 Code.

is not applicable to the civil statute at issue here. In Section 6653(b), the operative concept is not "attempt to evade" but "underpayment * * * due to fraud." The lesser civil penalty provision, Section 6651(a), imposes a maximum penalty of 25 percent "[i]n case of failure to file any return * * *, unless it is shown that such failure is due to reasonable cause and not due to willful neglect." This penalty may be imposed even in cases where the taxpayer honestly believed that he owed no tax but failed to exercise ordinary care and prudence to find out whether his belief was correct. *Henningsen* v. *Commissioner,* 26 T.C. 528, affirmed, 243 F. 2d 954 (C.A. 4); see also 10 Mertens, *Law of Federal Income Taxation* (1964 Rev.), Section 55.23.

While the two criminal sections both relate to willful wrongdoing, the two civil penalty sections distinguish between willful underpayment ("fraud") and mere unreasonable nondisclosure. The civil sections make the taxpayer's intent the distinguishing feature, unlike the criminal sections which must be interpreted (as in *Spies*) as covering different types of intentional nondisclosure. Thus, the court of appeals here properly made the test of "fraud" in the more severe penalty section whether or not there is "*intentional wrongdoing * * * motivated by a specific purpose to evade a tax* known or *believed* to be owing" and held that there must be convincing proof of such a specific purpose (Pet. 23; emphasis supplied.) And as the Ninth Circuit noted in *Powell* v. *Granquist,* 252 F.

2d 56, 60–61, this intent to defraud may be present whether or not there is "affirmative action."[7]

Petitioners mistakenly assert (Pet. 5) that the finding of fraud involved "exclusive reliance on the knowledge factor." In addition to the proof of failure to file for sixteen years despite proven knowledge of a duty to file returns, the court considered the taxpayer's testimony (Pet. 25) that he deliberately chose to conceal his tax indebtedness by filing no returns and by having his wife do his bookkeeping. The court said (Pet. 25): "We fail to see how such conduct indicates an innocent state of mind."

Only one case, *First Trust & Savings Bank* v. *United States,* 206 F. 2d 97 (C.A. 8), has found the *Spies* requirement applicable to a case of civil fraud. That case, however, is *sui generis*; it involved a 71-year-old taxpayer who had never filed an income tax return and whose professed ignorance of his duties under the tax laws was not disproved. Other cases reaching the question have adopted the standard used by the court here. *Powell* v. *Granquist,* 252 F. 2d 56 (C.A. 9); *Jones* v. *Commissioner,* 259 F. 2d 300, 303 (C.A. 5); and see the Tax Court cases cited at n. 7.

[7] The Tax Court has uniformly held that for the 50 percent civil fraud penalty there is no requirement of affirmative action. See *Bennett* v. *Commission,* 30 T.C. 114, 122–123; *Acker* v. *Commissioner,* 26 T.C. 107; *Finnorn* v. *Commissioner,* decided February 8, 1960 (P–H Memo T.C., par. 60,014); *Ripperger* v. *Commissioner,* decided February 28, 1961 (P–H Memo T.C., par. 61,058); *Trotte* v. *Commissioner,* decided June 16, 1966 (P–H Memo T.C., par. 66,129); *Cirillo* v. *Commissioner,* decided June 29, 1961 (20 T.C.M. 956), affirmed in relevant part, reversed in part, 314 F. 2d 478 (C.A. 3).

The conflict which petitioners claim with *Jones* is simply a conflict on the facts: the court there was unable to find a fraudulent intent, since the taxpayer's failure to pay taxes was based upon the fact that the government had long failed to pay him a much greater sum which it justly owed. In the present case, on the other hand, taxpayer made it clear by his testimony that no mere temporary delay was involved, that he never intended to pay unless he found that he could safely reveal his existence, and that he let year after year go by without consulting a lawyer to learn whether he could safely file returns.

Finally, neither *Moore* v. *United States,* 360 F. 2d 353 (C.A. 4), nor *Irolla* v. *United States,* 390 F. 2d 951 (Ct. Cls.), reach the issue in question. *Moore* held that conviction of the felony of attempt to evade tax would be available collaterally to prove fraud; it does not follow, and *Moore* does not state, that to prove fraud conduct amounting to the felony must be shown. The *Irolla* majority found fraud on facts including one affirmative misstatement, but otherwise rather like those of the present case, and then went on to state that in view of *Powell* v. *Granquist, supra,* and subsequent cases, "it will be seen that even if plaintiff's counsel had knocked the [single affirmative misstatement] out of the case, he would not have been assured of success." 390 F. 2d at 956.[8]

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[8] *Edwards* v. *United States*, 375 F. 2d 862 (C.A. 9), cited in the petition at pp. 7–8, is a criminal case, and hence irrelevant here.

CONCLUSION

There is no significant conflict of authority and the decision below is correct. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted.

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